

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.
--

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND A. MCGINNIS,

Defendant and Appellant.

2d Crim. No. B159463
(Super. Ct. No. BA192639)
(Los Angeles County)

Appellant Raymond McGinnis was convicted of numerous counts arising from his assault upon four detention officers. He contends there was insufficient evidence to support his conviction on three of these counts because the officer named as a victim of those counts could not identify him as the assailant. We reject this claim, but order the sentence modified in certain respects.

BACKGROUND

On September 5, 1999, appellant was being held at Eastlake Juvenile Hall. He was awaiting transportation to state prison, having been recently sentenced to life without the possibility of parole in an unrelated case. Appellant and the other juvenile hall inmates were supervised by detention service officers employed by the Probation Department.

At about 7:30 p.m., appellant lined up with several other inmates in the day room of his housing unit so that they could be taken back to their rooms for the night. Officer Yolanda Jennings was escorting the inmates from the day room two at a time, while Officer Babatunde Harun stood outside the day room door to monitor the remaining inmates. Appellant was standing at the end of the line, but broke line and attempted to walk through the day room door into the hallway. Harun told appellant to wait his turn. Appellant started to turn around, but the next thing Harun remembered was waking up in the hospital with a cervical collar.

Officer Larry Stonebrook was working in a nearby control room, monitoring certain inmates by camera, when he heard a loud thud. Appellant ran into the control room, punched Stonebrook in the face, and knocked him to the floor. He continued to hit Stonebrook with his fists and then with a chair. Jennings and Officer Arcelia Montenegro heard the commotion and ran into the control room. On the way, they saw Harun lying unconscious on the floor. They attempted to subdue appellant as he was beating Stonebrook. Both used their pepper spray, but appellant was able to take Montenegro's spray and use it on them. Appellant also hit Montenegro with the chair.

Jennings and Montenegro ran out of the control room. Appellant followed. Harun was still lying unconscious in the hallway, and appellant stopped to remove some keys from his pocket. Jennings struggled with appellant and wrested the keys away from him after using her pepper spray. Appellant ran into the restroom to wash his eyes, where he was finally subdued by Stonebrook.

All four detention officers were injured during the altercation. At the time of trial, Harun was on disability leave and suffered from severe headaches, a locked jaw and back and neck pains. He had difficulty standing and walking and could no longer run or ride a bicycle as he had before the assault. Stonebrook had required surgery on his shoulder, which was still painful. He also had a dent in his head and problems with his knee. Jennings had lower back pain and had been on

disability leave for four months after the assault. Montenegro had pain in her upper back and shoulders, and one of her shoulders had "dropped" two to three inches after appellant hit her with the chair.

Appellant was charged with a number of felony counts and was tried before a jury. He was convicted of three counts of aggravated assault by a life prisoner against Harun, Stonebrook and Montenegro (Pen. Code, § 4500),¹ three counts of assault on a correctional officer against Harun, Stonebrook and Montenegro (§ 245, subd. (c)), one count of battery with serious bodily injury against Harun (§ 243, subd. (d)), and two counts of using tear gas against a peace officer against Montenegro and Jennings (§ 12403.7, subd. (g)). In a bifurcated proceeding, the trial court determined that appellant had suffered four prior convictions under the Three Strikes law and a prior serious felony for purposes of the five-year prior serious felony enhancement. (§ 667, subd. (a); 1170.12.)

As to each of the three counts of assault by a life prisoner, the court imposed a consecutive sentence of 25 years to life under the Three Strikes law, plus an additional 5-year term for the enhancement under section 667, subdivision (a). Appellant received concurrent sentences of 25 years to life plus 5 years for each count of assault on a correctional officer and battery with serious bodily injury, and concurrent sentences of 25 years to life for his two convictions of using tear gas against a peace officer.

DISCUSSION

Sufficiency of the Evidence on Counts Involving Officer Harun

Appellant argues that the counts relating to Officer Harun must be reversed because the evidence was insufficient to prove that he, and not some other inmate, was the person who hit Harun and caused his injuries. Appellant points out that Harun himself could not remember what happened, and observes that no other

witnesses saw him hit Harun. We disagree that this renders the evidence of identity insufficient.

As with any challenge to the sufficiency of the evidence, we must review the record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Although we must ensure the evidence is "reasonable, credible and of solid value," we may not re-weigh the evidence or substitute our evaluation of a witness's credibility for that of the trier of fact. (*Ibid.*; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

The evidence in this case shows that appellant approached Harun and attempted to leave the day room before it was his turn to do so. After telling appellant to return to his place in line, Harun was knocked unconscious. Harun could not remember what happened, but several pieces of circumstantial evidence support the jury's conclusion that appellant assaulted and battered Harun: (1) appellant was standing a few feet away from Harun just before Harun was knocked unconscious, and no one else was standing between them; (2) appellant was the only inmate who had tried to leave the line; (3) Officer Stonebrook, who was working in the nearby control room, heard a loud thud at about the same time that Harun was knocked unconscious; (4) immediately afterward, appellant ran into the control room and began to hit Stonebrook with his fists and a chair; (5) appellant violently assaulted other officers who tried to subdue him; and (6) appellant tried to steal Harun's keys as he lay unconscious. A reasonable trier of fact could infer from this evidence that appellant, who had recently been sentenced to prison for a term of life without parole, had made

(Fn. cont'd.)

¹ All statutory references are to the Penal Code.

an attempt to escape which began with an assault on Harun and ended when he was finally subdued by Stonebrook.

The challenged counts are not subject to reversal simply because a different trier of fact might have drawn contrary conclusions from the circumstantial evidence. Our review begins and ends with the sufficiency of the evidence, which was more than adequate in this case.

Strike Allegation

The information alleged that appellant had suffered four prior felonies under the Three Strikes law: one conviction of first degree murder (§ 187, subd. (a)), two convictions of second degree robbery (§ 211) and one conviction of assault with a deadly weapon or by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)). In a bifurcated proceeding, the trial court found that all four prior convictions were true and qualified as strikes. Appellant contends the evidence was insufficient to support this finding with respect to the prior assault conviction under section 245, subdivision (a). We agree.

When appellant committed his crimes, aggravated assault under section 245, subdivision (a) was not designated a serious felony under section 1192.7, subdivision (c) or a violent felony under section 667.5, subdivision (c).² Accordingly, his prior assault conviction could only qualify as a strike if the evidence demonstrated that he had either personally inflicted great bodily injury or personally used a dangerous or deadly weapon while committing the crime. (§ 1192.7, subd. (c)(8) & (23); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261.)

The only evidence presented to show the nature of the assault was the abstract of judgment contained in appellant's prison records. The abstract describes

² Effective March 2000, section 1192.7 was amended to include subdivision (c)(31), which defines assault with a deadly weapon as a serious felony. This amendment does not affect appellant's case, because his crime was committed before its enactment.

the assault as "ADW OTHR W/ FIREARM OR GBI," a notation which is insufficient to show that appellant *personally* inflicted great bodily injury or *personally* used a weapon. The abstract also reflects that appellant's sentence on the assault count was enhanced under section 12022, subdivision (a), which applies when a *principal* is armed with a firearm during the commission of the offense, and which does not require personal use of a firearm. As the Attorney General acknowledges, this evidence was insufficient to prove that the prior assault was a serious or violent felony, and the Three Strikes finding based on that conviction must be reversed.

This does not require a remand or a modification of appellant's sentence, however. Appellant still had three prior convictions which required imposition of a life term under the Three Strikes law. Given the extremely serious nature of both the current and prior offenses, there is no reasonable probability that the trial court would have ordered two or three of the remaining priors stricken so that it could impose a lesser sentence. (See *People v. Alvarez* (1996) 49 Cal.App.4th 679, 692.) To the contrary, the court observed that in light of appellant's criminal history, striking the prior convictions would be "overwhelmingly" inappropriate.

Section 654

The court imposed consecutive sentences for the three counts of assault by a life prisoner under section 4500. (Counts 1, 4 and 6.) Those counts arose from his assaults upon Officers Harun, Stonebrook and Montenegro. Appellant argues that the remaining counts arose from the same course of conduct and should have been stayed under section 654,³ rather than ordered to run concurrently. (See *People v. Miller* (1977) 18 Cal.3d 873, 886-887.) The Attorney General acknowledges that the counts should be stayed.

³ Section 654 provides in part, "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

We agree, with the exception of the sentence on count 9. That count involved a violation of section 12403.7, subdivision (g), and was based upon appellant's use of tear gas against Officer Jennings. None of the other counts for which appellant was convicted and sentenced involved Jennings as a victim. Section 654 does not apply to separate acts of violence against separate victims, and does not bar imposition of a separate sentence on count 9. (See *People v. Akins* (1997) 56 Cal.App.4th 331, 339.)

Calculation of Minimum Term

The Attorney General contends the trial court did not utilize the proper method of calculating the minimum term for the indeterminate sentences on the three counts of assault by a life prisoner under section 4500. We agree.

The Three Strikes law requires that a defendant with two or more qualifying convictions be sentenced to an indeterminate sentence of life imprisonment with the minimum term being the greatest of three options, two of which are relevant here. (§ 1170.12, subd. (c)(2)(A); *People v. Acosta* (2002) 29 Cal.4th 105, 108.) The first of these options is "three times the term otherwise provided as punishment for each current felony conviction" (§ 1170.12, subd. (c)(2)(A)(i).) The second option, and the one utilized by the court in this case, is "twenty-five years." (§ 1170.12, subd. (c)(2)(A)(ii).)

When the punishment otherwise provided for the felony is itself a life term, the sentence under the first option is calculated by tripling the minimum period of parole eligibility. (*People v. Acosta, supra*, 29 Cal.4th at p. 114.) If this number is greater than the 25-year minimum term available under the second option, the court must impose that greater term. (§ 1170.12, subd. (c)(2)(A).) The punishment otherwise provided for a conviction under section 4500 (when, as here, the victim does not die) is "imprisonment in the state prison for life without the possibility of parole for nine years." (§ 4500.) Applying the "tripling" method for calculating the minimum term of the Three Strikes indeterminate sentence, the sentence on each of

appellant's section 4500 convictions would be 27 years to life. The trial court erred when it instead imposed the lesser sentence of 25 years to life.

Section 667, subdivision (a) Enhancements

Appellant suffered a single prior felony conviction for purposes of the five-year enhancement under section 667, subdivision (a).⁴ A final modification to the sentence is required to correct an unauthorized use of the trial court's true finding on this allegation.

The court added a separate five-year enhancement to each sentence imposed on counts 1-7. Unlike conduct-based enhancements for firearm use or great bodily injury, enhancements based on prior convictions do not attach to individual counts, but are added only once when computing the total sentence. (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 398-401.) When life terms are imposed under the Three Strikes law, the court must calculate the appropriate minimum terms for those sentences and then add any applicable section 667, subdivision (a) enhancements. (See *People v. Dotson* (1997) 16 Cal.4th 547, 559.) Because appellant suffered only one prior conviction under section 667, subdivision (a), the court should have imposed a single five-year enhancement.

⁴ The five-year enhancement under section 667, subdivision (a) applies only to prior convictions that have been "brought and tried separately." Although appellant had three prior convictions that qualified under the Three Strikes law (one murder and two robberies), they arose from a single prior case and supported only one enhancement under section 667, subdivision (a).

DISPOSITION

The judgment is modified in the following respects:

(1) The true finding on the fourth prior conviction alleged under the Three Strikes law, which was based on appellant's conviction for aggravated assault under section 245, subdivision (a), in case No. TA100236, is reversed.

(2) The concurrent sentences on counts 2, 3, 5, 7 and 8 are stayed pursuant to section 654.

(3) The consecutive sentences on appellant's three counts of violating section 4500, counts 1, 4 and 6, are modified to terms of 27 years to life rather than 25 years to life;

(4) The five-year enhancements under section 667, subdivision (a) are stricken as to counts 2, 3, 4, 5, 6 and 7. The single remaining five-year enhancement shall be ordered to run consecutively to the remainder of appellant's indeterminate sentence under the Three Strikes law.

The superior court is directed to amend the abstract of judgment to reflect these modifications and to forward a copy of the amended abstract to the Department of Corrections. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Craig E. Veals, Judge
Superior Court County of Los Angeles

John F. Schuck, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E.
Turchin, Supervising Deputy Attorney General, Robert David Breton, Deputy
Attorney General, for Plaintiff and Respondent.